Petition

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No. 81-664

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM STODDARD, Petitioner,

V

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER IT IS A VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION TO ALLOW A FEDERAL AGENT TO GIVE HEARSAY TESTIMONY THAT AN IMMUNIZED AND ABSENT ADMITTED PARTICIPANT IN A COCAINE SALE HAD IDENTIFIED PETITIONER'S RESIDENCE AS THE SOURCE OF THE COCAINE WHEN SUCH HEARSAY TESTIMONY DID NOT PROPERLY FALL WITHIN ANY OF THE HEARSAY EXCEPTIONS OF THE FEDERAL RULES OF EVIDENCE.

2. WHETHER THE FAILURE TO GRANT A MISTRIAL, WHEN AN OFFICER TESTIFIED UNEXPECTEDLY TO AN ADMISSION OF THE PETITIONER SUPPOSEDLY MADE AFTER HIS ARREST BUT BEFORE THE GIVING OF MIRANDA WARNINGS, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY PERMITTING THE USE OF PREJUDICIAL AND FALSE OR ILLEGALLY-OBTAINED EVIDENCE.

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IN THE SUPREME COURT OF THE UNITED STATES

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No._____

WILLIAM STODDARD, Petitioner,

V

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William Stoddard, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled cause on June 26, 1981.

OPINIONS BELOW

The June 26, 1981 opinion of the Tenth Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is unreported and is reprinted in Appendix A hereto, infra, page 36. The July 2, 1980 judgment of the District Court of the District of New Mexico is also unreported and is reprinted in Appendix B hereto, infra, page 42.

JURISDICTION

The case to be reviewed is a criminal case in which Petitioner was convicted of violations of 18 U.S.C. §2 and 21 U.S.C. §841(a)(1). The judgment of the Tenth Circuit Court of Appeals (Appendix A, infra, page 26) was entered on June 26, 1981. A timely Petition for Rehearing was denied on

August 12, 1981, and a stay of the issuance of the mandate was granted to September 5, 1981 (Appendix B, infra, page 43). The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves the Fifth Amendment of the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

> case to be a witness gainst himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Sixth Amendment of the Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case further involves Rule 803(24) of the Federal Rules of Evidence, which provides as follows:

> [The following are not excluded by the hearsay

> rule, even though the declarant is available as a witness:]
> A statement not specifically covered by any of the foregoing exceptions but equivalent circumstantial guarantees of trustworthiness the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Finally, this case involves Rule 804(b)(3) of the Federal Rules of Evidence, which provides as follows:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT OF THE CASE

Nature of the Proceedings

William P. Stoddard, Petitioner herein, was indicted on March 26, 1980, in Criminal No. 80-43 in the United States District Court

for the District of New Mexico at Albuquerque, New Mexico. Count I charged Petitioner and a co-defendant, Mike Myers, with distribution of cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Count II charged Petitioner with possession with intent to distribute a quantity of cocaine, in violation of 21 U.S.C. §841(a)(1).

A jury trial was had before Honorable Juan G. Burciaga, District Judge, in Albuquerque, New Mexico, on June 3 and 4, 1980. The jury returned a verdict of guilty as to both counts on June 4, 1980.

A sentence of imprisonment for a term of four years, with a special parole term of three years, and with a fine in the sum of $10,000.00 was imposed as to Count I. A sentence of two years imprisonment along with a special parole term of three years, with no

fine, was imposed as to Count II. The sentences in Count I and II are to run concurrently.

The sentences were appealed to the Tenth Circuit Court of Appeals; Notice of Appeal was filed on July 2, 1980. The Tenth Circuit Court of Appeals affirmed the conviction on June 26, 1981, and denied Petitioner's Motion for Rehearing on August 6, 1981. Simultaneously, the Court of Appeals granted a stay of the issuance of mandate until September 5, 1981.

Facts

Agents of the United States Drug Enforcement Administration (DEA) and the Albuquerque Police Department (APD) Narcotics Detectives had been working a case on Mike Myers. APD had agreed to provide $10,000.00 to buy four ounces of cocaine from him. A DEA agent and

an APD detective working undercover as bigtime drug buyers then arranged with Mike Myers to meet on November 30, 1979, to purchase four ounces of cocaine for $10,000.00. The place of the meeting was the residence of Lynn Mathis. The undercover agents went to the Mathis residence and met with Mike Myers and Lynn Mathis. Mike Myers' father, Ken, arrived while the agents were there. The people in the house advised the uncercover agents that they had just missed the "connection."

The undercover agents returned to the Mathis residence that evening. Other agents maintained surveillance from the street. After the two undercover agents entered the Mathis residence, a neighbor approached one of the surveillance agents and asked what he was doing. Rather than call attention to his surveillance, he repositioned himself.

Unbeknownst to the agent, the "connection" arrived at the Mathis residence while the agent was driving around the block.

The undercover agents inside the Mathis house were not aware that surveillance had been broken off at this critical time. Meanwhile, the "connection," consisting of two men, arrived. One remained in the garage and was never seen by the agents. The other, Mike Mahiu, entered the Mathis residence and advised that the transaction was ready to be completed. Officer Hearn then went to his truck, got the cash, and returned to the Mathis house. This was the signal to the surveillance agents to enter the house five minutes later. This "signal" was unseen however because the agent was driving around the block t the time. Presumably, the other surveillance agents were not in a position to observe the signal.

Mike Mahiu counted the cash. He then handed it through the back door of the garage to the unseen person. Officers only saw an arm extended to receive the cash and hand a package to Mike Mahiu.

Mahiu brought the package into the kitchen, and the apparant cocaine was weighed. A small portion was given to Lynn Mathis as a commission for allowing her residence to be used for the transaction.

The agents inside decided between themselves to effect an arrest when five minutes passed and the surveillance officers failed to appear. Before this was decided, Mike Mahiu and his unseen assistant left the premises in the Volkswagon with the cash. The outside surveillance agents saw the vehicle leave, obtained a description of the vehicle, and noticed that it had Canadian license plates.

The undercover officers inside the Mathis house announced their identity and arrested Mike Myers, Ken Myers, and Lynn Mathis. They then sought help, not knowing what had happened to the surveillance agents. A marked APD vehicle arrived at the residence. At that point, the surveillance agents outside decided they would enter, still not knowing that the two persons who had made the delivery of the cocaine had departed the premises with APD's $10,000.00.

The agents later made a deal with Lynn Mathis. In return for her being immunized, she told the officers Mike Mahiu's first name and what she believed to be his place of employment. The officers were able to locate Mahiu, and the undercover agents recognized him as the delivery man. They searched him and found several of the bills that had been supplied by APD. Serial numbers on those

bills matched the serial numbers that had previously been recorded. Mike Mahiu admitted his participation but claimed not to know the source of the cocaine or to whom the rest of the $10,000.00 had been delivered. Mike Mahiu then made a deal with the DEA and APD agents. He agreed to help locate the person who had been in the garage when the cocaine transaction occurred. In return, Mike Mahiu was immunized.

The DEA and APD agents located the second man, Richard Madden, as he was driving in the Volkswagon with Canadian license plates in the city of Albuquerque. Mr. Madden also made a deal with the APD and DEA. He agreed to reveal the source of the cocaine and the place to which the remainder of the cash had been taken. In return, he was immunized. No agreement was made with Lynn Mthis, Mike Mahiu, or Richard Madden that

they would not have to testify in future proceedings. That was not a part of the bargain. Apparently, neither Mike Mahiu nor Richard Madden were ever fingerprinted.

Madden then drove with the officers and showed them Petitioner's house on Guadalupe Trail in the northwest quadrant of Albuquerque.

The undercover agents and the other officers then obtained a search warrant, on their affidavit, about 6 a.m. on December 1, 1979, authorizing the search of Petitioner's residence.

Madden, after being released by the officers, and unbeknownst to the officers, went to Petitioner's residence. It was quite late at night, and Petitioner was not yet at home. Madden woke up Petitoner's wife, advising her that he had pulled off a "big deal" and wanted Petitioner and his wife to

go party with him. Petitioner's wife declined. Madden then requested that she keep a large amount of cash and a closed tin container for him. She agreed to do this. The tin was placed in a cupboard, and the money was placed in the drawer of another cupboard.

The various officers arrived at Petitioner's residence at about 6:40 a.m. on December 1, 1979 to execute the search warrant. Petitioner, in his sleeping clothes and obviously awakened by the officer, admitted the officers. The officers did not make a formal arrest of Petitioner and his wife until after the tin box containing cocaine was located. At the time of the formal arrest, the officers read Petitioner his Miranda rights. These rights were not waived.

APD Officer Neher testified in the trial

that he found the tin, opened it, and discovered apparent cocaine. He also testified that he asked Petitioner if the box was his and that Petitioner nodded his head, before he had been advised of his Miranda rights.

Officer Chavez testified that, as Petitioner and his wife were being handcuffed, Petitioner asked "why are you arresting her? She had nothing to do with it."

Three separate reports were prepared by the officers concerning the events of November 30 and December 1. None of the investigative reports included any reference to the alleged statement by Petitioner or any reference to the questions by Neher and the response by Petitioner. In fact, Officer Erekson testified in the grand jury that, when Petitioner was given his rights, he declined to say anything. Erekson was present when Agent Chavez read Petitioner his

rights. Erekson was present when Neher found the tin box containing cocaine. Petitioner's trial counsel had been advised a few days before trial by letter from the prosecuting attorneys that Officer Chavez had told them in pre-trial conferences of Petitioner's alleged remark that his wife was not involved. On the evening before trial, Petitioner's trial counsel was advised by the prosecuting attorneys that Officer Neher had told them that, when he found the tin containing cocaine, Petitioner "nodded" his head. Petitioner's trial counsel was never advised until Neher's trial testimony that Neher had asked Petitioner if the tin was his.

The prosecuting attorneys never sought to subpoena Ken Myers, Lynn Mathis, Mike Mahiu, or Richard Madden for trial. They refused to reveal the identities of Mahiu and

Mathis. At that time, defense counsel sought to have them subpoenaed as defense witnesses. The addresses and telephone numbers for those persons were not current, and the DEA agents were never able to serve the subpoenas. Nevertheless, the prosecuting attorney, in this opening statement at the trial of this case, stated:

> CI No. 2 directed the agents and the detectives involved in this case to the residence of the defendant in this case. You will learn that the defendant in this case was the source. He was guy that provided the cocaine.

Petitioner's trial counsel moved for a mistrial because of these remarks, but the motion was denied. The trial court gave a limiting instruction to the jury to disregard the prosecuting attorney's statement about what another person may have said to the agents.

However, DEA Agent Elias Martinez was

later permitted to testify before the jury that Richard Madden had pointed out Petitioner's house on Guadalupe Trial and told the agent that that was where he picked up the cocaine. The trial court permitted this over objection, citing sua sponte Rule 803(24) of the Federal Rules of Evidence.

The Tenth Circuit Court of Appeals relied upon U.S. v. Vitale, 596 F.2d 688 (5th Cir. 1979), cert. denied, 444 U.S. 868 (1979) in affirming the trial court's admission of hearsay testimony.

Reasons for Plenary Consideration

Because the trial court misconstrued the Federal Rules of Evidence and the Tenth Circuit Court of Appeals misconstrued the case upon which it relied for its affirmance, because the Court of Appeals did not adequately discuss the issues of due process violation or Sixth Amendment right to

confrontation, and because these Constitutional rights are fundamental rights and the Federal Rules of Evidence are fundamental procedural guidelines which need to be construed narrowly and carefully, Petitioner believes the questions presented are so substantial as to require plenary considertion.

BASIS FOR FEDERAL JURISDICTION

This case was properly brought in federal court pursuant to 18 U.S.C. §3231. Petitioner was charged with violations of 18 U.S.C. §2 and 21 U.S.C. §841(a)(1).

ARGUMENT

Hearsay

The trial court could not foresee that

only very weak circumstantial evidence would connect Petitioner to the Count I sale of cocaine and that the only direct evidence which connected Petitioner to the cocaine sale was equally applicable to Petitioner's wife who was never charged. During the trial, Elias Chavez attempted to testify as to information given to him by Madden. Defense counsel objected on hearsay grounds. He was overruled. Chavez again began to discuss what Madden had told him about the cocaine, and again defense counsel objected, as Madden was not present to testify or be cross-examined. The court overruled the motion, stating:

> Well, the Court is going to permit that under subparagraph 24 of rule 803. The Court finds that the statement is offered as evidence of a material fact. The statement is more probative to that point which it is offered, other than evidence which they could procure through reasonable

> efforts, and that the interest of justice would be served by the admission of the statement. The objection is overruled.

At this point, Chavez described his trip with Madden to Petitioner's house which was pointed out as the cocaine source.

The testimony was not offered by the prosecution under any particular exception to the rule against hearsay. However, it obviously could not have been admitted under Rule 804(b)(3) as a statement agaist penal interest since Madden had been immunized the evening of November 30, 1979, and such immunity had been concurred in by an Assistant United States Attorney. The trial court, sua sponte, ruled that it fell within Rule 803(24) of the Federal Rules of Evidence. This ruling, however, failed to meet the requirements of Rule 803(24).

The statement was not more probative on

the point on which it was offered than any other evidence which the proponent could have procurred through reasonable efforts. The testimony of the various agents made it crystal clear that they were able to locate Madden the same evening Madden took away their cash. The agents had both Mahiu and Madden detained, if not in custody, early on the evening of November 30, 1979. The prosecutors elected not to call Madden and in fact kept his identity a secret until the trial commenced. By the time Madden's identity was made known to Petitioner's trial counsel, he could not be located on one day's notice, but this is the fault of the government, and it is clear that they failed to make reasonable efforts to locate the witness Madden.

Certinly, the interests of justice are not served by the admission of such hearsay. If Petitioner had been afforded his Sixth

Amendment right to confront witnesses, Madden could have been subjected to cross-examination. His demeanor could have been observed by the jury, and the jury could have weighed the credibility of this man who was an active participant in the cocaine transaction, and who was conveniently immunized from prosecution.

The trial court found that there were guarantees of trustworthiness in the hearsay, but that finding was based on no evidence and was made in a vacuum. The testimony of the agent as to what Madden said did not indicate Petitioner was the source. Such hearsay could have supported a finding that Petitioner was the source of the cocaine but could also have supported a finding that Petitioner's wife was the source of the cocaine. The same testimony could have been a device for Madden to obtain immunity while

also throwing the investigators off the track of the real source.

The testimony adduced by the government from Petitioner is consistent with the third proposition. A similar issue was raised in United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978). There, the government was permitted to use the hearsay statement of Bailey's alleged accomplice. The Third Circuit reversed Bailey's conviction, noting that Rule 803(24) was intended to have a narrow focus.

In Bailey, the court offered the defense a continuance to prepare to meet and respond to the hearsay testimony. In the instant case, Petitioner had no such opportunity. There was no notice that the hearsay would be offered, nor were the name and address of the witness provided.

The same issue was dealt with in United

States v. Mandel, 591 F.2d 1347, 1368-69 (4th Cir. 1979), in which there was a lack of notice and in many instances a lack of identification of the alleged declarance. The same abuse of Rule 803(24) resulted in the reversal of convictions in United States v. Mathis, 559 F.2d 294 (5th Cir. 1977) and United States v. Love, 592 F.2d 1022 (8th Cir. 1979).

In the instant case, the Tenth Circuit relied upon the decision in U.S. v. Vitale, 596 F.2d 688, 689 (5th Cir.), cert. denied, 444 U.S. 868 (1979), as precedent for holding admissible an out-of-court statement made by a non-testifying informant identifying Petitioner's home as the place he picked up the cocaine.

Petitioner contends that Vitale is not appropriate precedent. The court in Vitale said:

> Precedent permits such evidence provided that it is simply background information showing that police officers did not act without reason, and in addition that it does not point specifically to defendant. (emphasis supplied)

First, in the case at bar, police officers had a search warrant. That is the reason they were at, and searched, Petitioner's residence. The officers' testimony established probable cause for the issuance of the search warrant, evidence not material to any issue to be determined by the jury. In either event, it should not have been admitted.

Second, no one in the courtroom at the time thought the evidence was offered for the purpose asserted. Petitioner objected to it as hearsay, and the judge admitted in under Rule 803(24). There was no opportunity to ask for a limiting instruction and none was given sua sponte by the court. The testimony

admitted, coupled with the improper opening remarks by the prosecutor to the effect that a confidential informant had identified Petitioner as the source and his home as the place where the cocaine had come from, was improper and prejudicial.

The case at bar is further distinguishable from Vitale because the information herein came from an immunized participant in the crime as opposed to an unknown informant. In addition, there was no connection asserted between the Defendant and the barroom identified in Vitale while in the case at bar, the place identified was Petitioner's home. This fact, alone or coupled with the improper remarks and additional hearsay which came to the jury's attention, pointed specificially to Petitioner. This is not permitted by Vitale.

The principal government witness in the case at bar was a man who never appeared in court. No reason was given for his failure to appear, and no good reason existed to deny Petitioner the right to confront witnesses against him. The paucity of admissible evidence establishing Petitioner as the culprit emphasizes the effect of the inadmissible testimony. It is simply unreasonable to believe none of the jurors were influenced by the prosecutor's statement that an admitted participant in the crime identified Petitioner as his source of supply, or that they could disregard hearsay testimony that Petitioner nodded his head yes when asked if the cocaine found in the house was his.

Admission

Officer Neher testified about the December 1 search of Petitioner's house. He

stated that once the tin can had been found, he opened it up, saw the suspected cocaine, showed it to Petitioner, and asked Petitioner if it belonged to him, whereupon Petitoner nodded his head.

This alleged question and answer were given before Petitioner was warned of his rights.

Under the circumstances, Petitioner was entitled to be warned of his rights to counsel and against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The alleged statement could have been used against him, if he testified contrarily, but not in the case in chief and not until he testified. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Petitioner's counsel, just prior to trial, asked if the Petitioner had made any

statements at the time of the arrest. He was told by letter that the Petitioner said, "Why don't you leave her? Why are you arresting her? She doesn't have anything to do with anything."

One day before the trial, Petitioner's attorney was told by the prosecutor that, at the time somebody picked up the can (with the cocaine), Petitioner was making some kind of nodding motion.

The government didn't know until Neher testified that Neher had specifically asked Petitioner a question, "Is this yours," and Petitioner nodded, "Yes," in response to it. The testimony was just as suprising to the government as it was to the Petitioner.

There can be no doubt that the statement Officer Neher made was highly prejudicial, the issue of such "suprise" testimony has been addressed before:

> The district attorney knew, or should have known, the testimony the officer was going to give and should have warned him not to make the statement. Every prosecutor who offers a witness to testify to conversations with an accused should know that the witness will relate if given a free hand. The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial. The court struck out the objectionable statement of the officer but the damage had been done and could not have been cured by the court's admonition. The mere direction that the testimony should be disregarded was not antidote for the poison that had been injected into the minds of the jurors.

People v. Bently, 131 Cal.App.2d 687, 281 P.2d 1 (1955); People v. Carr, 163 Cal.2d 568, 329 P.2d 746 (1958).

Detective Jim Ereckson's testimony before the grand jury was that the Petitioner was advised of his rights and that he said

nothing at all. Ereckson was present when Neher found the cocaine. The testimony of Agent Chavez to the effect that Petitioner had said that his wife was not involved was questionable enough, since three separate reports had failed to include any reference to it. Officer Neher's suprise testimony is even more damaging and prejudicial. Neher's bias was obvious, and the prosecutor had already requested the trial court to admonish Neher to not refer to the suspects as "crooks."

"A conviction obtained through the use of false evidence known to be such by representatives of the state, must fall under the due process clause of the Fourteenth Amendment; the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinois, 360 U.S. 264 (1959).

The circumstances of the claimed "admission" by Petitioner have every indicia of having been fabricated by Neher. The circumstances demonstrate that it would have been inadmissible, at least until after Petitioner had testified. The admission of such testimony tended to force Petitioner to testify in order to rebut Neher's testimony. It cannot be said that the testimony of Neher about the "admission" had no effect on the jury's decision, and the prejudicial impact is clear.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

NOT FOR ROUTINE PUBLICATION

FILED
United States Court of Appeals
Tenth Circuit
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Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM STODDARD,

Defendant-Appellant.

No. 80-1702

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D. C. No. 80-00043-1)

Scott McCarty of D'Angelo & McCarty, Albuquerque, New Mexico, for Defendant-Appellant.

Larry Gomez, Assistant United States Attorney (R. E. Thompson, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

APPENDIX A

This is an appeal from a conviction for possessing with intent to distribute and distributing cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Appellant raises five issues on appeal. Among them, he argues that the evidence was insufficient to sustain the verdicts.

Appellant's arrest and convictions grew out of a controlled buy of cocaine for $10,000. Through a series of mishaps, the money left the premises of the buy in the hands of an unidentified person before officers had effected the planned arrests. The officers traced the missing $10,000 through two persons, each of whom had retained a small portion of the money. Based on information supplied by the second person, the officers directed their attention to, and obtained a search warrant for, the home of appellant. There the officers discovered a closed tin containing a quantity of cocaine. In appellant's bedroom, which was occupied by appellant and his wife at the time the warrant was executed, the officers found the bulk of the missing $10,000. There was expert testimony that the cocaine found was part of the same batch purchased in the controlled buy, and the serial numbers of the seized money identified it as part of the $10,000. During the arrest of appellant and his wife, appellant stated: "She has nothing to do with this. Why are you going to put her under arrest?" Record, vol. 2, at 102.

The government's evidence that either appellant or his wife, or both, were involved in the sale set up by the officers was very substantial. The presence in his house of the cocaine identified

with the controlled buy and the presence in the privacy of his bedroom itself of the marked money would be enough to sustain appellant's conviction so long as the record further establishes with sufficient evidence that appellant and not his wife was the culpable party. Appellant's statement at the time he was arrested that his wife had "nothing to do with this" is sufficient to establish this link in the evidence. The statement not only shows guilty knowledge of the money and drugs but also exonerates his wife, making him alone responsible for its presence in the bedroom. The test applicable to this issue is whether there was sufficient evidence from which a reasonable jury could find appellant guilty beyond a reasonable doubt. In light of the overwhelming evidence generally connecting appellant with the crimes alleged, the quoted statement is sufficient to complete the link for purposes of sufficiency of the evidence.

Appellant complains of four other matters occurring in the course of the presentation of the evidence. He complains of (1) the court's failure to grant a mistrial when the prosecutor made a prejudicial statement in his opening comments to the jury; (2) the court's admission of certain hearsay testimony; (3) the court's failure to grant a mistrial when an officer testified unexpectedly concerning an inadmissible statement; and (4) the prosecutor's cross-examination on certain points of appellant and his witnesses, which in appellant's view was so prejudicial as to require reversal even though he made no objection as to those points at trial. We have examined these claims, both individually and collectively, and conclude that they do not warrant reversal of these convictions.

Following the prosecutor's improper statement in his opening comments that a federal agent would testify as to a confidential informant's identification of appellant as the source of the cocaine, the trial court decided not to grant a mistrial. Instead, the court instructed the jury that an opening statement is not evidence and that anything in the U. S. Attorney's opening statement "regarding what another person might have said to the agents is to be totally disregarded by you." Record, vol. 2, at 38. The court handled the matter carefully according to standards well established in this and other courts. We find no abuse of its discretion. See Brown v. United States, 380 F.2d 477, 479 (10th Cir. 1967) (error cured by admonition), cert. denied, 390 U.S. 962 (1968); Maestas v. United States, 341 F.2d 493, 496 (10th Cir. 1965) (error not cured by admonition).

An officer testified that an immunized participant in the cocaine sale, who was not present at the trial, had identified the appellant's residence as the source of the cocaine. The evidence was offered to explain the officer's reason for being at and searching the appellant's residence. The evidence pointed only to a particular location and did not point specifically to appellant. Therefore, it was properly admissible under the rule stated in United States v. Vitale, 596 F.2d 688, 689 (5th Cir.), cert. denied, 444 U.S. 868 (1979).

During the trial, a government witness unexpectedly testified concerning an admission made by appellant which the court previously had ordered excluded from the evidence. The court, as requested by

appellant, instructed the jury to disregard that evidence. Appellant now contends that the court ought to have granted a mistrial. Examined in the entire context of the record, the trial court's method of handling this matter did not constitute an abuse of discretion. See United States v. Cooper, 464 F.2d 648, 656 (10th Cir. 1972) ("It is presumed the jurors observed the instructions of the court and speculation that this was not done may not be employed in assailing their verdict."), cert. denied, 409 U.S. 1107 (1973).

Finally, for the first time on appeal, appellant argues that the prosecutor's questions of appellant and his witnesses regarding appellant's familiarity with and use of marijuana was so prejudicial as to require reversal under our plain error rule. The abuses alleged by appellant do not remotely satisfy the threshold of that rule.

AFFIRMED.

United States of America vs. RECEIVE JUL 8 1980 **United States District Court** for

DEFENDANT: WILLIAM P. STODDARD

DISTRICT OF NEW MEXICO

DOCKET NO. ▶ 80-43 CR

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
7	2	80

COUNSEL
- ___ WITHOUT COUNSEL. However the court advised defendant of right to counsel and defendant elected to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
- X WITH COUNSEL VICTOR P. D'APOLITO, Esq.

PLEA
- ___ GUILTY, and the court being satisfied that there is a factual basis for the plea.
- ___ NOLO CONTENDERE, ___ NOT GUILTY

FINDING & JUDGMENT

There being ___ verdict of
- ___ NOT GUILTY. Defendant is discharged
- X GUILTY.

Defendant has been convicted as charged of the offense(s) of Possessing with Intent to Distribute and Distribution of Cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 USC 841(a)(1) and Aiding and Abetting, in violation of 18 USC 2, as charged in Counts I and II of Indictment 80-43 filed March 26, 1980.

NO ANSWER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that

SENTENCE OR PROBATION ORDER

As to Count I, IT IS ADJUDGED that defendant will pay a fine to the United States in the sum of $10,000.00 and that defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS. IT IS FURTHER ADJUDGED that a special parole term of THREE (3) YEARS is imposed.

As to Count II, IT IS ADJUDGED that defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. IT IS FURTHER ADJUDGED that a special parole term of THREE (3) YEARS is imposed.

SPECIAL CONDITIONS OF PROBATION

The sentence in Count II is to run concurrently with the term of imprisonment imposed in Count I.

FILED

JUL 2 1980

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within maximum period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE

SIGNED BY

U.S. District Judge

JUAN G. BURCIAGA

July 2, 1980

U.S. Marshal

( ) Deputy

APPENDIX B

RECEIVED AUG 12 1981

JULY TERM - August 6, 1981

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 80-1702
	)	
WILLIAM STODDARD,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's:

A. Motion for extension of time to file a petition for rehearing;

B. Motion for a stay of the issuance of the mandate for 30 days;

C. Petition for rehearing.

Upon consideration whereof, it is ordered:

1. An extension of time to file the petition for rehearing is granted to July 16, 1981.

2. A stay of the issuance of the mandate is granted to September 5, 1981.

3. The petition for rehearing is denied.

Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX C

Opposition

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-664

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM STODDARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ELLEN BYERS
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the trial court's admission of hearsay evidence constituted prejudicial error.

2. Whether the trial court abused its discretion in refusing to grant a mistrial after an officer testified unexpectedly concerning an inculpatory admission allegedly made by petitioner during the search of his house.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 35-39) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1981. Rehearing was denied on August 6, 1981. The petition for a writ of certiorari was filed on September 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on one count of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (count 1), and one count of possession of cocaine with intent to distribute, in violation

of 21 U.S.C. 841(a)(1) (count 2). Petitioner was sentenced to four years' imprisonment and a three-year special parole term on count 1. He was sentenced to a concurrent term of two years' imprisonment and a three-year special parole term on count 2. He was also fined $10,000 on count 1. The court of appeals affirmed (Pet. App. 35-39).

The evidence at trial showed that on November 30, 1979, undercover DEA agents, acting with Albuquerque, New Mexico police officers, made a controlled buy of cocaine for $10,000 in marked bills. The money was taken by an unidentified person from the premises where the buy occurred before a planned arrest could be effectuated. The officers, after tracing the missing $10,000, obtained a search warrant authorizing a search of petitioner's house in Albuquerque (Tr. 58, 100). During the search on the following day, agents discovered a tin can containing cocaine and marijuana (Tr. 60). In addition, they found $8,100 of the marked bills in petitioner's bedroom (Tr. 101, 112). Petitioner and his wife were arrested (Tr. 102, 123). Expert testimony showed that the cocaine found was part of the same batch purchased in the controlled buy (Tr. 176-177).

The controlled buy had commenced when an undercover policeman negotiated with one Mike Myers for the delivery of four ounces of cocaine in exchange for the $10,000 (Tr. 42-44). Thereafter, two undercover DEA agents met Myers and two other individuals in a house in Albuquerque and were told that they had just missed the cocaine "connection" (Tr. 43). The agents left and returned to the house half an hour later to meet Myers and the other two again (Tr. 46). A short time later, a fourth individual, Mike Mahiu, arrived and advised the agents that the cocaine was available, but insisted upon counting the money before completing the transaction (Tr. 46). After counting the $10,000, Mahiu handed it through a door leading to the garage and the

cocaine was handed back through the door (Tr. 46, 53). The agents were unable to see who had handed Mahiu the cocaine (Tr. 46).

After running a field test on the substance, the agents arrested Myers and the two other individuals (Tr. 48-49). Due to a mishap, Mahiu and the other individual in the garage left undetected and in possession of the $10,000 (Tr. 48, 75).

Following an investigation, the authorities located Mahiu at a local tavern (Tr. 54, 97-98). They searched him and found several of the $100 bills that had been utilized in the transaction (Tr. 57). Mahiu advised the authorities that he had given the money to one Richard Madden (Tr. 55, 57, 98, 142). The agents then located Madden and found that he too possessed some of the marked $100 bills. Madden took them to petitioner's house and said that was where he had picked up the cocaine (Tr. 98-100). With this information, a search warrant was obtained to search petitioner's house.

ARGUMENT

1. DEA Agent Elias Chavez testified that after Richard Madden had identified a "particular house on Guadalupe Trail" as the source of the cocaine that had been transferred to the undercover agents, he and other agents obtained a search warrant, which they executed at petitioner's home (Tr. 99-100). Petitioner contends (Pet. 20-29) that the testimony referring to a "house on Guadalupe Trail" was inadmissible hearsay and that its admission violated his Sixth Amendment right to confrontation.

The trial court and the court of appeals properly rejected this claim. Petitioner's defense was that Madden planted both the cocaine and the $8,100 at the petitioner's house after telling the police that he had acquired the drugs there (Pet. 14-15). Given that contention, it is difficult to understand how the admission of Chavez's testimony, which was

hearsay insofar as it may be understood to have related Madden's out-of-court statement that he procured the cocaine from petitioner's house, could have been materially prejudicial to the petitioner. Rather, the making of such an accusation by Madden is perfectly consistent with the story that petitioner told the jury (Tr. 205-213). If Madden intended to frame the petitioner, as petitioner contended, nothing could be more natural than that he should tell the police he had acquired the cocaine at Stoddard's house.

Moreover, any error in the admission of Chavez's testimony was harmless for a second reason. As we have noted, $8,100 of the $10,000 in marked bills were found in petitioner's home the day after the buy. A chemical analysis also showed that the cocaine purchased by the agents and the cocaine found in petitioner's house came from the same source (Tr. 169-173, 176-177).[1] Thus admission of Madden's identification of the Guadalupe Trail house as the source of cocaine was harmless even in the absence of a limiting instruction, in light of other evidence at trial that compellingly supported that fact. See *United States* v. *Mancillas,* 580 F. 2d 1301, 1309-1310 (7th Cir.), cert. denied, 439 U.S. 958 (1978).

Finally, it is by no means clear that the trial court erred in permitting Chavez to testify that Madden had identified some "particular house on Guadalupe Trail" as the source of the drugs. The trial court admitted the evidence under the hearsay exception of Fed. R. Evid. 803(24) ("evidence of a material fact * * * more probative on the point for which it is offered than any other evidence which the proponent can

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[1]The jury could properly have found that petitioner and not his wife was the source of the cocaine from petitioner's statement to the arresting officers when he and his wife were being handcuffed. Petitioner stated, "She has nothing to do with this. Why are you going to put her under arrest?" (Tr. 102).

procure through reasonable efforts," the admission of which would serve the interests of justice). The admissibility of Madden's statement on this ground is doubtful. But during the pretrial hearing and at trial counsel for petitioner repeatedly objected that the warrant had been improperly issued on the basis of "wrong information" (Tr. 84; see also Tr. 12-29, 63, 83, 141-147). Under those circumstances, it was proper for the court to admit Chavez's statement not to prove the truth of the matter asserted but, as the court of appeals concluded, simply "to explain the officer's reason for being at and searching the [petitioner's] residence" (Pet. App. 38). See, *e.g.*, *United States* v. *Walker*, 636 F. 2d 194 (8th Cir. 1980); *United States* v. *Stout*, 599 F. 2d 866, 869-870 (8th Cir.), cert. denied, 444 U.S. 877 (1979); *United States* v. *Vitale*, 596 F. 2d 688, 689 (5th Cir.), cert denied, 444 U.S. 868 (1979); *United States* v. *Brown*, 522 F. 2d 10, 12 (9th Cir. 1975); Fed. R. Evid. 801(c).

2. At trial, Detective Kenneth Neher of the Albuquerque Police Department testified that when he opened the tin can found in petitioner's kitchen cabinet and saw four baggies of suspected cocaine, he asked petitioner if they belonged to him, and petitioner nodded in an affirmative manner (Tr. 115). Neither defense counsel nor the prosecutor knew that Neher would so testify (Tr. 115-117). Defense counsel requested the trial court to declare a mistrial, or in the alternative to strike the testimony. At that time, the court denied both motions (Tr. 118). However, the court later decided to grant petitioner's motion to strike and instructed the jury to put the testimony out of their minds (Tr. 152-153). All of the jurors indicated that they could put the testimony out of their minds during deliberations (Tr. 153-154).

Petitioner contends that the trial court's failure to grant a mistrial violated due process. He argues that the testimony concerning his response to Neher's inquiry requires a new

trial because either: (1) the testimony was true, and the inquiry constituted custodial interrogation entitling him to *Miranda* warnings, or (2) the testimony was fabricated, and he was prejudiced by the admission of false evidence.

It is quite unclear from the record whether the court instructed the jury to disregard Neher's testimony because it thought the statement inadmissible under *Miranda* or because it considered its admission unfair on grounds of surprise. See Fed. R. Crim. P. 16(a)(1)(A).[2] In either event, petitioner was not entitled to a new trial.

When the district court instructed the jury to disregard Neher's testimony, the evidence before him did not show any *Miranda* violation. The testimony by the arresting officer[3] showed the following: Shortly before 7:00 a.m., two DEA agents and "detectives from the Albuquerque Police Department, two uniformed officers," knocked on petitioner's door with a search warrant and were admitted (Tr. 58-59). In the course of their search, Sergeant Neher found in a kitchen cabinet a tin can containing cocaine, whereupon he asked Stoddard if it was his. Stoddard nodded assent (Tr. 111-115). At that point the petitioner had not been put under arrest (Tr. 101-102, 122). The mere presence of police officers in a home executing a search warrant does not put the occupants of the house in custody for purposes of *Miranda*. See *Beckwith* v. *United States*, 425 U.S. 341 (1976); *United States* v. *Littlepage*, 435 F. 2d

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[2]The petitioner does not contend that the nondisclosure was blameworthy. The prosecutor too was surprised by Neher's statement at trial (Pet. 31).

[3]A contrary version of the facts was not offered by petitioner until after the judge had already instructed the jury to disregard Neher's testimony (Tr. 193-195). Whether that account provides some basis for concluding that the interrogation was custodial is something the trial court did not have to decide, since it had already instructed the jury to disregard Neher's testimony.

498 (5th Cir. 1970), cert. denied, 402 U.S. 915 (1971); *United States* v. *Hall*, 421 F. 2d 540 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970).[4] It is not clear that the trial judge disagreed (Tr. 124, 151-152).

If the basis for instructing the jury to disregard Neher's statement was that it was not disclosed in response to Stoddard's Rule 16 request (Tr. 147-151), the court's failure to grant a mistrial is hardly an issue warranting review by this Court. The Rule explicitly leaves with the trial judge the power to issue whatever order "it deems just under the circumstances," Fed. R. Crim. P. 16(d)(2), and the court of appeals found that "in the entire context of the record, the trial court's method of handling this matter did not constitute an abuse of discretion" (Pet. App. 39).

Moreover, even assuming Neher's testimony was inadmissible, the trial judge gave the petitioner one of the alternative forms of relief he requested.[5] Petitioner did not indicate to the court after the testimony was stricken that the relief granted was insufficient, or that only a mistrial would rectify the harm done. The judge carefully instructed the jurors to disregard it, and they indicated their ability and willingness to comply with his direction (Tr. 153-154). Now that he has been convicted, petitioner attempts to obscure

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[4]Sergeant Neher did testify that he probably would not have permitted Stoddard to leave the house until the warrant had been executed, "for our safety" (Tr. 123). This would not mean, however, that petitioner was in custody for *Miranda* purposes. Cf. *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981). In any event, there is no suggestion that this intention was communicated to Stoddard, so it is of little account in determining whether the interrogation was custodial. See *Allen* v. *United States*, 390 F. 2d 476, 478-479 (D.C. Cir. 1968); *Williams* v. *United States*, 381 F. 2d 20, 22 (9th Cir. 1967).

[5]"We first move for a mistrial, and if that was denied, we would ask the Court to order—to state to the jury that they should disregard that statement" (Tr. 150).

his acquiescence by claiming that Neher's testimony was false. Yet he offers no convincing reason for concluding that Neher's account was untrustworthy as a matter of law. Thus, even assuming the jury disobeyed the admonition to disregard the testimony, there is nonetheless no basis for concluding that the jury was incapable of reliably assessing its credibility. Petitioner's counsel extensively cross-examined the government's witnesses regarding Neher's statement (Tr. 102-105, 119-123, 130-138), and petitioner offered at trial his own version of the incident (Tr. 195). Given those checks on improper use of Neher's testimony, the petitioner's failure to object to the relief granted, and the other convincing evidence of his guilt, the trial court did not abuse its discretion in refusing to grant a mistrial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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Assistant Attorney General

ELLEN BYERS
Attorney

JANUARY 1982

DOJ-1982-01